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Suel O. Arnold

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### Repository Citation

Suel O. Arnold, *Everyday Problems in the Trial of an Automobile Action*, 37 Marq. L. Rev. 208 (1954).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol37/iss3/2>

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# EVERYDAY PROBLEMS IN THE TRIAL OF AN AUTOMOBILE ACTION\*

SUEL O. ARNOLD\*\*

The backlog of cases in the courts of metropolitan areas prompts the question, "Do the judicial systems as they now function meet today's needs?" Chief Bolitha Laws answered the question by saying:<sup>1</sup>

"One of the principal reasons why our court calendars are clogged is because of the modern tendency to prolong trials."<sup>2</sup>

Judge Laws says that we must stop men from over-trying cases; "that if we are to meet the needs of today we must find a way in which to try cases on short and simple issues and work with zeal to clear up the congested dockets."<sup>3</sup>

## NECESSITY FOR PLEADING SPECIFIC GROUNDS OF NEGLIGENCE

A navigator about to embark upon an ocean voyage studies maps and charts and plots his course. The pilot of a jet airplane prepares and files a flight plan and, before he leaves the airport, has chosen a route which will guide him to his destination. In the same manner, an able lawyer defines the issues in his complaint and thereby charts his future course. It is true that pleading has been neglected by the courts, but as our Supreme Court has pointed out,<sup>4</sup> the standing which a lawyer has in the profession and before the courts depends in a considerable degree upon the pleadings which he drafts.

In the Federal Court, particularly, pleading has become a lost art.<sup>5</sup>

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\* Adapted from a lecture delivered at a seminar of the Junior Bar Association of Milwaukee on March 18, 1953.

\*\* L.L.B. University of Wisconsin 1924; Member Milwaukee Bar Association.

<sup>1</sup> PROCEEDINGS OF SECTION OF INSURANCE LAW, AMERICAN BAR ASSOCIATION 1951, Page 16-17.

<sup>2</sup> Judge Laws on this point said (Page 18, PROCEEDINGS OF SECTIONS OF INSURANCE LAW, AMERICAN BAR ASSOCIATION 1951):

"I do not know whether you of the insurance section have had that experience or not, but the lawyers of Washington are learning to stretch the usual personal injury cases into a week or ten days. I just do not understand it. When I came to the bar we used to try such cases in a day or a day and a half. It seems to me that a personal injury case should not require ten days, or fifteen days to try."

<sup>3</sup> PROCEEDINGS OF SECTION OF INSURANCE LAW, AMERICAN BAR ASSOCIATION 1951, Page 20, where Judge Laws also said:

"We must have men who know how to introduce evidence in court, how to split the wheat from the chaff, how to prevent the split into collateral issues, how to stop an ambitious person from making a career out of a case, and finally how to stop men from overtrying cases."

<sup>4</sup> Lukken v. Hanover Fire Ins. Co. 194 Wis. 569, 576-577, 217 N.W. 404 (1928).

<sup>5</sup> Professor O. L. McCaskill "The Modern Philosophy of Pleading" 38 A.B.A.J., Page 123 (1952) Diogardi v. Durning 1939 F 2d 774, 775; Discussion by the Judges of the Eighth Circuit on the need for amendment of Rule 8(a) (2)

Indeed, the recommended form for stating a claim in a personal injury action<sup>6</sup> does not require the specific grounds of negligence to be alleged.

Our Supreme Court has recently stated that the specific grounds of negligence must be pleaded and that evidence of negligence in pleadings is inadmissible unless such proof does not operate to the disadvantage of the defendant.<sup>7</sup>

At the risk of oversimplification, we suggest the following as examples of good pleading:

"The collision (or accident) was caused by the negligence of the defendant in the following respects:

- "a. He operated his automobile at an excessive rate of speed.
- "b. He failed to maintain a proper lookout.
- "c. He failed properly to keep his automobile under control.<sup>8</sup>
- "d. He failed to yield the right of way to the plaintiff.<sup>9</sup>
- "e. He failed to give an audible signal of his intention to pass before passing or attempting to pass a vehicle proceeding in the same direction in violation of Subsection (1) of Section 85.16 of the Statutes.
- "f. He deviated from the traffic lane in which he was traveling without first ascertaining whether such movement could be made with safety to vehicles approaching from the rear, in violation of Subsection (2) of Section 85.16 of the Statutes.
- "g. He failed to give a signal of his intention to turn to the left (or to the right, or into a private road or driveway) in violation of Sections 85.17, 85.175, and 85.176 of the Statutes."

A complaint, which alleges that the defendant "violated the ordinances of the City of Milwaukee and the Statutes of the State of Wisconsin in such cases made and provided," is subject to a motion to strike or to make more definite and certain.<sup>10</sup>

FRCP, 13 FRD 253. Chief Judge Jankowitz of the United States District Court for the Southern District of California in "*Chief Characteristics of Federal Trial Practice*" 12 FRD 269, 275, 279 insists that the Federal Rules of Civil Procedure as properly interpreted requires a plaintiff to allege facts sufficient to show that he has a legal claim against the defendant. See also Chief Judge James Alger Fee "*The Lost Horizon in Pleading under the Federal Rules of Civil Procedure*" 48 CAL. LAW REVIEW 491, 495 (1948).

<sup>6</sup> See Form No. 9, Rules of Federal Procedure adopted by the United States Supreme Court in 1938.

<sup>7</sup> Cook v. Wis. Tel. Co. 263 Wis. 56, 62, 56 N.W. 2d 494 (1953); Miller v. Kenosha Electric R. Co. 135 Wis. 68, 115 N.W. 355 (1908); Tolleman v. Sheboygan L.P. & R. Co. 148 Wis. 197, 134 N.W. 406 (1912).

<sup>8</sup> No Wisconsin decision but see Words and Phrases.

<sup>9</sup> This applies at intersections, but only in those cases where the plaintiff approaches the intersection on the defendant's right. Reynolds v. Madison Bus Co. 250 Wis. 294, 26 N.W. 2d 653 (1947).

<sup>10</sup> WIS. STATS. (1951) §§263.43, 263.44; Maxwell v. Fink 264 Wis. 106, 58 N.W. 2d 415, 418 (1953).

If the defendant is guilty of gross negligence and ordinary negligence, both may be alleged in the same complaint but they must be pleaded as separate causes of action.<sup>11</sup>

If the defendant is insured and the insurance policy was issued in Wisconsin, the insurance company may be made the sole defendant in an action in the state courts.<sup>12</sup> It is at least doubtful whether the insurance company can be made the sole defendant in the Federal Courts.<sup>13</sup> If there is a policy defense, the insured is a necessary party under the state court practice and an indispensable party under the Federal Rules of Civil Procedure.<sup>14</sup> The Federal Court, therefore, will lose jurisdiction in a diversity of citizenship case unless there is also diversity of citizenship between the plaintiff and the insured.<sup>15</sup>

If the insurance policy is written outside the State of Wisconsin and in a state where the no-action clause is good, the insurance company cannot be joined as a party defendant.<sup>16</sup>

Before joining the insurance company as a party defendant in a case brought by the named insured, counsel for the plaintiff should study the insurance policy to determine whether it excludes coverage for injuries sustained by the named insured.<sup>17</sup> Counsel for the plaintiff should also determine whether the policy excludes coverage in a case brought by the employer of the named insured against a fellow employee.<sup>18</sup>

Where it is questionable whether the insurance company can be made a party, and where no notice has been served under Section 330.19 (5) of the Statutes, the insured should be joined as a party defendant. If the action against the insurance company is dismissed more than two years after the cause of action has accrued, it is probable that the court will hold that an action against the insured is barred

<sup>11</sup> *Nelson v. American Employers Insurance Co.* 262 Wis. 271, 55 N.W. 2d 13 (1952).

<sup>12</sup> *Elliott v. Indemnity Insurance Company* 201 Wis. 445, 448, 230 N.W. 87 (1930); *Oertel v. Fidelity & Cas. Co.* 214 Wis. 68, 72, 251 N.W. 465 (1933); *Kujawa v. American Indemnity Co.* 245 Wis. 361, 363-364, 14 N.W. 2d 31 (1944).

<sup>13</sup> An insurance company may be joined as a party defendant only because of the enactment of Chapter 375 of the Laws of 1931 which amended Section 260.11(1) of the Statutes by adding the last sentence. The Statute as amended authorized the joinder of an insurance company as a party defendant in an automobile case. *Lang v. Baumann* 213 Wis. 258, 251 N.W. 464 (1933); *Oertel v. Fidelity and Casualty Company* 214 Wis. 68, 251 N.W. 465 (1933). The Federal Rules of Civil Procedure do not contain a provision authorizing the joinder of an insurance company as a party defendant.

<sup>14</sup> *Calhoun v. Western Casualty Company* 260 Wis. 34, 49 N.W. 2d 911 (1951).  
<sup>15</sup> *Barron and Halthoff "Federal Practice and Procedure,"* §515; *DeKorwin v. First National Bank* 156 F. 2d 858, 7th Cir., (1946).

<sup>16</sup> *Ritterbusch v. Sexsmith* 256 Wis. 507, 41 N.W. 2d 611 (1950).

<sup>17</sup> *Frye v. Thiege* 253 Wis. 596, 601-602, 34 N.W. 2d 793 (1948).

<sup>18</sup> *Ainsworth v. Berg* 253 Wis. 438, 445, 34 N.W. 2d 790 (1948). Compare *McMann v. Faulstich* 259 Wis. 7, 12, 47 N.W. 2d 317 (1951).

because of the failure to comply with Section 330.19 (5) of the Statutes.<sup>19</sup>

The plaintiff's counsel must consider the advisability of joining the named insured or omnibus insured as a party defendant. If the plaintiffs are husband and wife, and if both have the same attorney, the spouse driver cannot be joined as a defendant because the attorney would be in an inconsistent position. Many practitioners, including some of the older lawyers, occasionally forget that they cannot represent the plaintiff driver in one case and make him a defendant in another case.

Where there are two or more joint tortfeasors, counsel for the defendant may wish to cross-complain for contribution. The right to contribution arises only in cases of common liability.<sup>20</sup> Where an employee, who is injured in the course of employment and who is subject to the Workmen's Compensation Act, brings an action for personal injuries against the third party, there is no right to contribution. The Workmen's Compensation Act is the exclusive remedy for the employee. There is no common liability which will permit contribution from the employer in an action by the employee against the third party.<sup>21</sup> Where a mother or father brings an action for damage to an automobile owned by them and operated by an unemancipated minor child, a tortfeasor defendant has no right of contribution since a parent cannot sue an unemancipated minor child.<sup>22</sup> Where a husband brings an action for damage to his automobile caused while his wife is driving, the person operating the automobile with which the husband's automobile collides has no right of contribution because the husband cannot sue his wife for property damage.<sup>23</sup> The right to contribution does not exist in case the husband brings an action for personal injuries caused by his wife's negligence.<sup>24</sup>

When an action for personal injuries is commenced more than two years after the cause of action has accrued, the plaintiff should allege that notice has been given under Section 330.19 (5) Statutes.<sup>25</sup>

A cause of action for contribution is not bottomed upon Section 330.19(9) of the Statutes and may be maintained even though no notice has been served under that statute.<sup>26</sup>

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<sup>19</sup> *Doucha v. Mayer*, 249 Wis. 453, 25 N.W. 2d 80 (1946).

<sup>20</sup> *Ellis v. Chicago and NW Ry. Co.* 167 Wis. 392, 409-410, 167 N.W. 1048 (1918).

<sup>21</sup> *Britt v. Buggs* 201 Wis. 533, 230 N.W. 621 (1930).

<sup>22</sup> *Munsert v. Farmer Mut. Auto Ins. Co.* 229 Wis. 581, 586, 281 N.W. 671 (1938).

<sup>23</sup> WIS. STATS. (1951) §246.075.

<sup>24</sup> WIS. STATS. (1951) §246.075.

<sup>25</sup> The requirements of notice applies to minors as well as adults. *Voss v. Tittel* 219 Wis. 175, 262 N.W. 579 (1935).

<sup>26</sup> *Ainsworth v. Berg* 253 Wis. 438, 34 N.W. 2d 793 (1948) which overruled *Palmer v. Auto Mutual Insurance Co.* 234 Wis. 287, 291 N.W. 364 (1940).

## PREPARATION FOR TRIAL

1. *Investigation*

Lawsuits are usually won or lost long before the case is actually called for trial. Success in court depends upon the investigation; if the case has been properly investigated, the outcome may usually be predicted. A competent investigation serves two purposes: first, it enables the lawyer to appraise the value of the case and to make an intelligent settlement of the case if that is possible; second, if it becomes necessary to try the case the trial lawyer will have the facts necessary to win the case. These statements have been made so many times that they may seem commonplace. The subject of investigation is too important and too specialized to be considered at length here. We suggest that every trial lawyer should read, "*What a Trial Lawyer Should Find in an Investigation File*," by Hon. Clarence W. Heyl.<sup>27</sup>

2. *Negotiations for Settlement*

Negotiations for settlement may take different forms depending upon the locality in which the attorneys practice. Some lawyers do not discuss a settlement until a conciliation hearing or a pre-trial conference is had under the supervision of a trial judge. There is no reason for postponing negotiations for settlement. The overwhelming majority of insurance companies prefer to settle claims without court expense. In most cases, except where there is a question of liability, or where there is a policy defense, there should not be a substantial difference between the plaintiff's counsel and the insurance company's counsel as to the settlement value of the case. From the standpoint of public relations, it is essential for counsel to cooperate in order to relieve congestion in the courts. It is incumbent upon attorneys, therefore, to exhaust settlement possibilities without infringing upon the time of trial judges.

In conducting settlement negotiations, the attorneys upon both sides must be honest and above-board. Occasionally plaintiff's counsel may deceive an insurance company. It is also possible that a sharp defendant's counsel may drive an unconscionable bargain. In the long run, however, such successes will react against the guilty party. The lawyer may then find that he is on the "list" of plaintiff's attorneys or insurance attorneys and his road thereafter will be rough and rugged. Courtesy and fair dealing still pay large dividends.

3 *Discovery Procedure*

Wisconsin, unlike many other states, has had discovery statutes

<sup>27</sup> A speech delivered at the 16th Annual Convention of National Association of Independent Insurance Adjusters, June 18-20, 1953 at San Francisco. Mr. Heyl is a past chairman of the Insurance Section of the American Bar Association and is a member of the firm of Heyl, Royster & Voelker, Peoria, Ill.

for many years. Older practitioners still refer to a "Section 4096 examination." Younger members of the bar refer to an adverse examination under Section 326.12 of the Statutes.

The purpose of an adverse examination is twofold. In the first place, the adversary wants to find out everything that the party examined knows about the case. The second purpose is to outline the issues in the case.<sup>28</sup>

Adverse examinations can be expedited if the pleadings have been properly drawn and frame the issues. Items of special damages and a description of personal injuries can thereby be promptly secured.

Attorneys continually attempt to obtain the names of witnesses in discovery examinations conducted in state court actions. This question has not been directly passed upon in Wisconsin. Many lawyers feel that a party is not obliged to disclose the names of witnesses. Under Rule 26, Federal Rules of Civil Procedure, the names of witnesses can be secured if the action is brought in the Federal Court.

A plaintiff sometimes requests an insurance company to permit inspection of a statement he has given. It has been held that the plaintiff may compel the production of such a statement for purposes of making a copy.<sup>29</sup>

If it happens that the party examined is a minor and no guardian ad litem has been appointed, the examination should be immediately halted. The adverse examination of such minor cannot be used at the trial.<sup>30</sup>

Under Section 326.12 of the Wisconsin Statutes, only parties or their agents or the persons on whose behalf or interest the action is brought may be adversely examined. In certain circumstances a fellow employee may be examined adversely in an action brought by an employee against a third party.<sup>31</sup>

Under Rule 26, Federal Rules of Civil Procedure, any person whether a party or a witness may be examined for the purpose of discovery.

Statements of employees and witnesses need not be produced under the Wisconsin practice, either at an adverse examination or under Section 269.57 of the Statutes.<sup>32</sup> Under the federal practice, however, such statements must be produced and in exceptional circumstances

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<sup>28</sup> Compare *Maxwell v. Fink* *supra* note 10.

<sup>29</sup> *Wis. Stats.* (1951) §269.57; *Walsh v. Northland Greyhound Lines, Inc.* 244 *Wis.* 281, 12 *N.W. 2d* 20 (1943).

<sup>30</sup> *Will of Jaeger* 218 *Wis.* 1, 10, 259 *N.W.* 842 (1935).

<sup>31</sup> *Empl. Mutual L. Ins. Co. v. Icke* 225 *Wis.* 304, 274 *N.W.* 283 (1937).

<sup>32</sup> *Hamilton v. Reinemann* 233 *Wis.* 572, 587, 290 *N.W.* 194 (1940); *Bell v. Milw. E.R. & L. Co.* 169 *Wis.* 408, 172 *N.W.* 791 (1919); *Lehan v. C. & NW Ry. Co.* 169 *Wis.* 327, 172 *N.W.* 787 (1919).

even the work product of a lawyer may be subject to production and inspection.<sup>33</sup>

Attorneys sometimes forget that a guardian ad litem or a brother attorney cannot be examined adversely under Section 326.12 of the Statutes.<sup>34</sup>

Before leaving the subject of an adverse or discovery examination, we suggest that every attorney owes a duty to the party examined to describe the adverse or discovery examination. The person to be examined should be told that he will appear before a Court Commissioner or a Notary Public; that he will be sworn; that he will be questioned by the opposing counsel; that the purpose of the examination is to obtain the story of the person examined; that if he is a party one of the purposes will be to obtain admissions against interest; that his answers will be taken down in shorthand or on a stenographic machine and will ultimately appear in a typewritten transcript. The person examined should also be told that the transcript of the adverse or discovery examination will be used at the trial by the party conducting the examination.

#### MEDICAL EVIDENCE<sup>35</sup>

##### 1. *Discovery Procedure*

Section 269.57 (2) of the Statutes provides that the court may require the plaintiff to submit to a medical examination. The Statute is permissive and not mandatory. In *Leusink v. O'Donnell*,<sup>36</sup> the court in effect held that the Statute was mandatory and that a party is entitled to have a medical examination of his adversary. The court also held that an order should be entered requiring the plaintiff to consent in writing to the inspection by the defendant of hospital and nurses' records.

<sup>33</sup> The Federal Court for the Eastern District of Wisconsin regularly requires production of statements of employees and witnesses. In the leading case of *Hickman v. Taylor* 329 U.S. 495 (1947), the United States Supreme Court held that in certain circumstances it may be necessary to require the lawyer to produce a portion of his work product for inspection. This case has given rise to a great deal of consternation on the part of lawyers who carefully prepare their cases for trial. No one has yet suggested any cogent reason why the discovery procedure should be used to penalize the case-painstaking lawyer.

<sup>34</sup> *Rohleder v. Wright* 162 Wis. 580, 156 N.W. 955 (1916).

<sup>35</sup> For a general discussion of medical evidence the following are recommended: "*The Medical Expert*" by Edward D. Bronson, Panel on Expert Testimony 1952, Page 12, published by the Section of Insurance Law, American Bar Association; "*The Medical Witness Preparedness and Examination*" by Raoul D. Magona, Panel on Trial Tactics 1951, Page 33, published by the Section of Insurance Law, American Bar Association; "*Some Strategic Aspects of Cross Examination of Neuropsychosis Testimony in Personal Injury Cases*" by Herbert Winston Smith, Proceedings of the Section of Insurance Law, American Bar Association 1950, Page 198; "*Expert Medical Opinion Evidence with Reference to Automobile Damage Cases*" by Oscar T. Toebass, Past President, Wisconsin Bar Association, Proceedings of the Section of Insurance Law 1947, Page 130.

<sup>36</sup> 255 Wis. 627, 39 N.W. 2d 675 (1949).



## 2. *Qualifications of Medical Experts*

The physician in a sister state cannot testify as an expert under Section 147.14 (2) of the Statutes except in behalf of a Wisconsin resident and then only where no other testimony is available.<sup>37</sup>

In the Federal Court in the Eastern District of Wisconsin, Judge Tehan regularly permits physicians licensed in sister states to testify for non-resident parties. If therefore the plaintiff is a resident of a sister state and the requisite amount in controversy exists, plaintiff's counsel should consider instituting the action in the Federal Court in order to expedite introduction of medical testimony.

## 3. *Admissibility in Evidence of History Given by the Patient*

Where the medical examination is made for the sole purpose of testifying, the history given by the patient is not admissible.<sup>38</sup> In *Mader v. Boehm*,<sup>39</sup> the court permitted the history given to a doctor, examining the patient for the purposes of testifying, only to be admissible where the history recited had been introduced in evidence by testimony under oath of another witness. It may be that this case has been overruled by the *Schiels* case.

It has been held that where an examination has been made after suit has been started, or after a determination that a suit would be started, the examining physician cannot testify as to the history even though one of the purposes of the examination is for treatment.<sup>40</sup>

## 4. *Physician's Privilege*

Under Section 325.21 of the Statutes, the court held that the physician's exemption from disclosure should in reason be limited to such disclosure as would injure the patient's feelings and reputation.<sup>41</sup>

Where a medical witness has been called, the party calling him waives the privilege of other physicians who have treated such party.<sup>42</sup>

Two other points in connection with medical testimony may be briefly noted. The first is that the failure to call a physician who has treated a party may be a subject of comment to the jury.<sup>43</sup> The second

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<sup>37</sup> *Morril v. Komaskinski* 256 Wis. 417, 41 N.W. 2d 620 (1950). (Holding that an Osteopath may testify for a Wisconsin resident.) *Landrath v. Allstate Insurance Company* 259 Wis. 248, 257-258, 48 N.W. 2d 485 (1951). (Holding that a Minneapolis physician may be permitted to testify where he was consulted by a Wisconsin physician to assist treating a Wisconsin patient.)

<sup>38</sup> *Schiels v. Fredrick* 232 Wis. 595, 288 N.W. 241 (1939).

<sup>39</sup> 213 Wis. 55, 250 N.W. 854 (1933).

<sup>40</sup> *Kath v. Wis. Central R. Co.* 121 Wis. 503, 512, 99 N.W. 217 (1904).

<sup>41</sup> *Leusink v. O'Donnell* 255 Wis. 627, 39 N.W. 2d 698 (1949).

<sup>42</sup> *Cretney v. Woodmen Accident Co.* 196 Wis. 29, 35-36, 219 N.W. 448 (1928). The case of *Cohodes v. M & M L. & T. Co.* 149 Wis. 308, 312-313, 135 N.W. 879 (1912) to the contrary is no longer the law because of the subsequent amendment to §325.21 of the Statutes.

<sup>43</sup> *Naus v. C & M E. R. Co.* 185 Wis. 178, 181, 201 N.W. 281 (1924).

is that a plaintiff may recover although his condition is diagnosed as a traumatic neurosis.<sup>44</sup>

### TRIAL OF THE ACTION

A trial brief, including the form of the proposed special verdict, should be furnished to the court at the opening of the trial. Many judges permit the trial brief to be filed without giving a copy to the opposing counsel. If the court disapproves of this practice, the trial brief may be used solely for the convenience of the attorney who drafted it. If trial briefs were required in every case, the trial of most cases would be shortened, and the character of performance by the attorneys would be improved.

Rough diagrams may be introduced in evidence to show the location, generally, of various objects at the scene of an accident. Where, however, the drawings are used for the purpose of affirmative evidence, *i.e.* as to physical possibilities or impossibilities, or to show distances, the drawing must be to scale.<sup>45</sup> An Elkhorn lawyer uses drawings made to scale and has had manufactured a rubber stamp representation of an automobile to scale.

Where an attempt is made to use admissions contained in a complaint which is later amended, it is necessary to offer the first complaint in evidence. When the amended complaint is filed, the former complaint drops out of the case.<sup>46</sup>

If a party is compelled to use a witness who has been convicted of a criminal offense, he may be asked, on his examination in chief, whether he has been convicted of a criminal offense and thereafter he cannot be cross examined as to the nature of the offense.<sup>47</sup>

Attorneys are at times charged with putting leading questions. It has been held in *Nickel v. State*<sup>48</sup> that the question, "Now what, if anything, did the defendant say about . . .," was not a leading question because it did not call for a yes or no answer. In *Malone v. State*,<sup>49</sup> it was held that a question, "What is the fact . . . as to whether or not" a statement was made, did not constitute a leading question. Nevertheless, some judges frown upon whether or not questions and consider them to be leading.

Attempts are sometimes made to minimize damages by showing that the injured party received Workmens Compensation or carried accident or hospital insurance. Objections are also made to items of damage, such as gratuitous services by members of the family, or

<sup>44</sup> *Landrath v. Allstate Insurance Co.* 259 Wis. 248, 48 N.W. 2d 485 (1951).

<sup>45</sup> *Schwellenbach v. Wagner* 258 Wis. 526, 531-532, 46 N.W. 2d 852 (1951).

<sup>46</sup> *Dixon v. Davidson* 202 Wis. 19, 22, 231 N.W. 276 (1930).

<sup>47</sup> Wis. STATS. (1951) §325.19; *State v. Adams* 257 Wis. 433, 435, 43 N.W. 2d 446 (1950).

<sup>48</sup> 205 Wis. 614, 238 N.W. 508 (1931).

<sup>49</sup> 192 Wis. 379, 388, 212 N.W. 879 (1927).

by friends, or by physicians. The rule has long been established in Wisconsin that the injured party is entitled to be compensated for the injury actually sustained and for the reasonable cost of services rendered, whether gratuitous or paid for.<sup>50</sup>

It has been held that evidence that a driver is a good or bad driver is not admissible especially where such driver is deceased.<sup>51</sup>

There is sometimes apprehension concerning the use of an adverse examination at the time of the trial. Section 326.12, Statutes specifically provides that the adverse examination can be used only by the party who took it. The question, as to whether the adverse examination can be used in the event of the death or absence of a party, does not seem to have been squarely passed upon.<sup>52</sup> The party taking the adverse examination may read parts of the testimony into evidence as a part of this case without calling the party examined to the witness stand. A party called adversely may be examined by his own counsel immediately after testifying on adverse examination on matters testified to by the witness.<sup>53</sup>

A very troublesome question is presented as to the admissibility in evidence of the statements of employees of a corporate defendant. It is well established that such statements may not be introduced in evidence as admissions by the corporation against interest where they are not part of the *res gestae*.<sup>54</sup> Nevertheless, statements made by such employees may be brought to the attention of the employee who made them upon his cross examination for the purpose of contradicting and impeaching the witness. A proper instruction, however, must be given to the jury that such statements are not substantive evidence. Such statements, of course, cannot furnish the basis of a verdict against the corporate defendant.

Statements of an injured person, made within seventy-two hours after the accident, are admissible in evidence under Section 325.28 of the Statutes where given to an officer or a third party having no interest in the litigation.<sup>55</sup>

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<sup>50</sup> *Campbell v. Sutliff* 193 Wis. 370, 214 N.W. 374 (1927); *Papenfuss v. Shell Oil Co.* 254 Wis. 233, 238-239, 35 N.W. 2d 920 (1949).

<sup>51</sup> *Zastrow v. Schaumberger* 210 Wis. 116, 125-126, 245 N.W. 202 (1932).

<sup>52</sup> *Lange v. Heckel* 171 Wis. 59; 175 N.W. 788 (1920); *Lamberson v. Lamberson* 175 Wis. 398, 411, 184 N.W. 708 (1921); *Estate of Shinoe* 212 Wis. 481, 486, 250 N.W. 505 (1933); *F. H. Bresler v. Bauer* 212 Wis. 386, 248 N.W. 788 (1933).

<sup>53</sup> *DeVries v. Dye* 222 Wis. 501, 269, N.W. 270 (1936).

<sup>54</sup> *Hamilton v. Reinemann* 233 Wis. 572, 290 N.W. 194 (1940); *Lehan v. Chicago & N. W. R. Co.* 169 Wis. 327, 172 N.W. 787 (1919); *Bell v. Milwaukee E. R. & L. Co.* 169 Wis. 408, 414, 172 N.W. 791 (1919).

<sup>55</sup> *Kirsch v. Pomisal* 236 Wis. 264, 267, 294 N.W. 865 (1940); *Losching v. Fisher* 237 Wis. 193, 295 N.W. 712 (1941); *Hoffman v. Labutzke* 238 Wis. 164, 171, 298 N.W. 583 (1941); *Zastrow v. Schaumberger* 210 Wis. 116, 125, 245 N.W. 202 (1932).

Under Section 327.18 of the Statutes and *Jacobson v. Bryon*,<sup>56</sup> only that part of the police and sheriff's reports which consist of observations made by the officer are admissible in evidence in the courts in Wisconsin. Under the Federal Business Records Act,<sup>57</sup> such reports are admissible in toto in the Federal Courts.<sup>58</sup>

Where a party uses a statement given by the adversary for purposes of impeachment, and calls a portion of the statement to the witness' attention, counsel for the party who gave the statement has the right to introduce the entire statement in evidence, although the statement may contain evidence otherwise inadmissible.<sup>59</sup>

Damages to an automobile may be proved only by showing the fair market value of the car before the accident and the fair market value of the car after the accident. If the attorney desires to measure damages by the repair bill, he should obtain a stipulation to that effect from opposing counsel.

In practically every case involving damage to an automobile, witnesses testify as to the condition of the automobile after the accident. Counsel should be alert to object to such testimony, unless a foundation has been laid to show that at the time the witness saw the car it was in the same condition as it was immediately after the collision.<sup>60</sup>

At the conclusion of the plaintiff's case the defendant should move for a non-suit. After both sides have rested one of the parties should ask the court to declare the evidence closed. If this is not done, a party has the right to introduce additional evidence after motions have been made and argued for a directed verdict. In every case, the defendant should move for a directed verdict unless he does not desire the court to determine the issues of negligence and damage. In the Federal Court a motion for directed verdict, if denied, does not destroy the right of either party to have the case submitted to the jury.<sup>61</sup>

Although the Statutes do not require objections to be made at the time of instructions to the jury, it is better practice for the attorney to make such objections in the absence of the jury after the court has completed his instructions. The form of a special verdict rests in the sound discretion of the trial court,<sup>62</sup> but specific issues only should be submitted to the jury.<sup>63</sup> Objections to the special verdict must be made before the case goes to the jury.<sup>64</sup>

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<sup>56</sup> 244 Wis. 359, 12 N.W. 2d 789 (1944).

<sup>57</sup> 28 U.S.C. §1732.

<sup>58</sup> *McKee v. Jamestown Baking Co.* 198 F. 2d 551, 556 3rd Cir. (1952).

<sup>59</sup> *Dillenberg v. Carroll* 259 Wis. 417, 49 N.W. 2d 444 (1951).

<sup>60</sup> *Geason v. Schaefer* 229 Wis. 8, 11, 281 N.W. 681 (1938).

<sup>61</sup> Rule 50(b), Federal Rules of Civil Procedure.

<sup>62</sup> *Garcia v. C & N. W. R. Co.* 256 Wis. 633, 637, 42 N.W. 2d 288 (1950).

<sup>63</sup> *Stellmacher v. Wisco Hdwe. Co.* 259 Wis. 310, 314, 48 N.W. 2d 492 (1951);

*Matuschka v. Murphy* 173 Wis. 484, 487, 180 N.W. 821 (1921).

<sup>64</sup> *Johnson v. Sipe* 263 Wis. 191, 56 N.W. 2d 852, 856 (1953).

## CONCLUSION

The congestion in our trial courts can and will be eliminated. But the judges alone cannot be expected to do the job. There must be wholehearted cooperation on the part of the bar. To be helpful, lawyers must be prepared. Despite his best efforts, there are times when a lawyer is thrown into the trial of a case where he has not had a chance fully to prepare for trial. This paper is designed to help such a lawyer. If such purpose is achieved, it is hoped that those benefited will in their turn take the time to make a similar contribution.